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Supreme Court, U.S.
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No. 88-1828

In the Supreme Court of the United States

OCTOBER TERM, 1988

BERKLEE COLLEGE OF MUSIC,
PETITIONER,

v.

BERKLEE CHAPTER OF THE
MASSACHUSETTS FEDERATION OF TEACHERS,
LOCAL 4412, AFT, AFL-CIO,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Whether the Court of Appeals followed the correct standard of review in affirming the challenged arbitration award where the award draws its essence from the parties' collective bargaining agreement, and where the arbitrator acted within the scope of his authority in determining that he had the inherent power to formulate an appropriate remedy for any procedural violations by the parties where no remedy or penalty is contained in the collective bargaining agreement.

TABLE OF CONTENTS

I. QUESTION PRESENTED 1

II. TABLE OF CONTENTS. 2

III. TABLE OF AUTHORITIES 4

IV. STATEMENT OF THE CASE 7

V. GROUNDS FOR DENYING THE WRIT 8

A. THE COURT OF APPEALS DECISION IS IN ACCORD WITH THE DECISIONS OF THIS COURT, WHERE THE ARBITRATOR WAS ACTING WITHIN THE SCOPE OF HIS AUTHORITY IN RENDERING HIS AWARD AND WHERE THE AWARD DRAWS ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT 10

B. THE CHALLENGED ARBITRATION AWARD DRAWS ITS ESSENCE FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, AND IS WELL WITHIN THE MAINSTREAM OF ARBITRAL DECISION MAKING ON QUESTIONS OF PROCEDURAL ARBITRABILITY AND TIMELINESS. 13

C. THE PETITIONER'S ARGUMENTS MISSTATE THE DECISION OF THE COURT OF APPEALS AND ARE BASED ON A MISREADING AND MISINTERPRETATION OF THIS COURT'S DECISION IN MISCO. 21

VI. CONCLUSION 24

TABLE OF AUTHORITIES

CASE CITATIONS

Avco Corp. v. Mitchell, 336 F.2d 289, 6th Cir. 1964) 12

Chauffeurs, Teamsters & Helpers, Local No. 765 v. Stroehmann Bros. Co., 625 F.2d 1092 (3rd Cir. 1980) 12, 16

Detroit Coil Co. v. Machinists, Lodge 82, 594 F.2d 575, (6th Cir. 1979) 13, 16

International Brotherhood of Electrical Workers v. Coval Electric Corp., 576 F.Supp. 1128 (S.D. FLA. 1983) 12

Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972) 12

Operating Engineers Local 406 v. Austin Co., 784 F.2d 1262 (5th Cir. 1986) 12, 16

Ren Electronics v. Local 208, I.U.E., AFL-CIO, 665 F.Supp. 77 (D.Mass. 1987) 12

United Paperworkers International Union v. Misco, __ U.S. __, 108 S.Ct. 364 (1987) passim

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) 11, 13, 24

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) passim

United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574 (1960) 11, 13 24

Washington Hospital Center v. Local 722, S.E.I.U., 746 F.2d 1503 (D.C. Cir. 1984) 12, 16

Wiley v. Livingston, 376 U.S. 543 (1964) passim

ARBITRATION CITATIONS

Bogalusa Community Medical Center, 84 LA 978 (Nicholas, 1985) 18

Edward C. Levy Co., 81 LA 529 (Borland, 1983) 18

G&H Transportation, 75 LA 644 (Bullen, 1980) 18

International Paper Co., 82 LA 306 (Williams, 1984) 18

Kellogg Co., 71 LA 494 (Hon. 1978) 18

Kent County, MI, 75 LA 948 (Kruger, 1980) 18

Patterson-Sargent Co., 23 LA 21 (Willcox, 1954) 18

Township of Neville v. PA, 75 LA 668 (Freeman, 1980) 18

OTHER AUTHORITIES

Supreme Court Rules, Rule 17.1	8
Restatement (Second) of Contracts, Section 204	16
Restatement (Second) of Contracts, Section 229	16

IV

STATEMENT OF THE CASE

The Respondent agrees with the Petitioner's Statement of the Case in terms of its rendition of the relevant facts and the case's procedural history. To the extent that the Petitioner has chosen to improperly characterize or cast aspersions on the decisions and reasoning of both the Court of Appeals and the arbitrator in the course of its Statement of the Case, and to the extent that the Petitioner has included argumentative matter therein, the Respondent reserves its right to respond in the body of its argument in opposition to the granting of the writ of certiorari.

V

GROUNDS FOR DENYING THE WRIT

Review in this Court pursuant to a writ of certiorari is not a matter of right, but is an extraordinary remedy, subject to the proper exercise of discretion by the Court. The writ should be granted only where there are "special and important reasons therefore." Supreme Court Rules, Rule 17.1. There are no such reasons apparent here.

The Petitioner in the present case is actually seeking to overturn not just the decision below, but nearly thirty years of established federal precedent . Those precedents stand for the premise that collective bargaining arbitration awards should be upheld and affirmed by the courts except in the most extraordinary and compelling circumstances. See United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). This principle was most recently reaffirmed and reinforced by this Court in United Paperworkers International Union v. Misco, ____ U.S. ____, 108 S.Ct. 364 (1987). The First Circuit's majority opinion, challenged herein, is completely in accord with this Court's holding in Misco. The majority of the Court of Appeals

reasoned, quite correctly, and in accord with the original arbitration award, that it was clearly within the arbitrator's authority to determine what penalty, if any, should flow from the Union's failure to file an initial grievance in a timely fashion, where the collective bargaining agreement contained no provisions mandating a waiver of rights in the event of a late filing. Despite the Petitioner's rhetoric, a review of the provisions of the parties' collective bargaining agreement makes it quite plain that there was no "actual" language to be applied by the arbitrator, "literally" or otherwise, which would compel a different finding (Petition p. 8.) In order to carry out his responsibilities the arbitrator was required to draw inferences, come to logical conclusions, and frame an appropriate remedy, based on his cumulative experience in interpreting hundreds of collective bargaining agreements. The real danger to the collective bargaining process in the present case does not arise out of the decision of the Court of Appeals, but out of the Petitioner's insistence on challenging the original arbitration award. Litigation in this case has continued for more than two years, since the original award issued, while the Petitioner has steadfastly refused to submit the parties' dispute to a hearing and decision on the

merits. Such prolonged litigation can only lead to a breakdown of the entire collective bargaining process, and pose a serious threat to the grievance and arbitration procedures which have served labor and management so well over the last fifty years.

The Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied, and that the decision of the Court of Appeals should be allowed to stand as a final and binding decision in this matter.

ARGUMENT

A. THE COURT OF APPEALS DECISION IS IN ACCORD WITH THE DECISIONS OF THIS COURT, WHERE THE ARBITRATOR WAS ACTING WITHIN THE SCOPE OF HIS AUTHORITY IN RENDERING HIS AWARD AND WHERE THE AWARD DRAWS ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT.

The scope of judicial review of collective bargaining arbitration awards in the federal courts is extremely narrow. This Court established the parameters of that narrow scope of review with its

decisions in the Steelworkers Trilogy cases nearly thirty years ago.[1] Any remaining questions concerning the applicability of this narrow standard of review to issues of procedural arbitrability, including timeliness, were dealt with a few years later in Wiley v. Livingston, 376 U.S. 543 (1964). In Wiley, the Court held that questions concerning the procedural prerequisites to arbitrability, including the parties' compliance with contractual time limitations, are almost invariably intertwined with a "consideration of the merits of the dispute." The Court held that:

> Once it is determined...that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.
> Wiley v. Livingston, supra, at 557.

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[1] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574 (1960); , 363 U.S. 593 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Since the Wiley decision, both this Court and the lower federal courts have consistently held that questions of procedural arbitrability, including issues of timeliness and waiver, should be submitted first to the arbitrator, and that arbitral decisions on such matters are then subject to the same restricted scope of review as are decisions on the merits. See Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972); Ren Electronics v. Local 208, I.U.E., AFL-CIO, 665 F.Supp. 77 (D. Mass. 1987); Avco Corp. v. Mitchell, 336 F.2d 289, (6th Cir. 1964); Washington Hospital Center v. Local 722, S.E.I.U., 746 F.2d 1503 (D.C. Cir. 1984) aff'g in part, rev'g in part, 577 F.Supp 206 (D.D.C. 1983); International Brotherhood of Electrical Workers v. Coval Electric Corp., 576 F.Supp. 1128 (S.D. FLA. 1983). Chauffeurs, Teamsters & Helpers, Local No. 765 v. Stroehmann Bros. Co., 625 F.2d 1092 (3rd Cir. 1980); Operating Engineers Local 406 v. Austin Co., 784 F.2d 1262 (5th Cir. 1986).

In those rare instances where the courts have vacated arbitration awards because the arbitrator had reached the merits despite the union's failure to comply with explicit time deadlines, they have done so only where there has been a "clear failure to draw the essence of the award from the Agreement."

Detroit Coil Co. v. Machinists, Lodge 82, 594 F.2d 575, (6th Cir. 1979). In the present case, as will be discussed more fully below, the arbitrator committed no such error. He did not exceed his authority under the parties' agreement, and he acted within the scope of his inherent responsibility in framing an appropriate remedy. See Enterprise Wheel and Car Corp., supra, at 597. The Misco decision and a host of precedents reaching back to this Court's seminal decisions in the Steelworkers Trilogy mandate that the Petition for a Writ of Certiorari should be denied, and that the Court of Appeals decision affirming the challenged arbitration award should be allowed to stand as a final decision in this matter.

B. THE CHALLENGED ARBITRATION AWARD DRAWS ITS ESSENCE FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, AND IS WELL WITHIN THE MAINSTREAM OF ARBITRAL DECISION MAKING ON QUESTIONS OF PROCEDURAL ARBITRABILITY AND TIMELINESS.

In his challenged Award, arbitrator Mark Irvings found that the underlying grievance should be heard on the merits despite the fact that it had been

untimely filed.[2] He based that decision on his interpretation of the explicit terms of the parties' collective bargaining agreement, as well as on his conclusions as to the logical inferences to be drawn from those terms that were not included in the agreement. In reaching this determination, the arbitrator was clearly cognizant of possible limitations on his authority pursuant to the terms of the parties' collective bargaining agreement. He carefully reviewed the agreement looking for any contractual provisions explicitly mandating default or forfeiture for failure to comply with the filing deadlines. He did not find any such provisions. Rather, he found implicit in the terms of the agreement an obligation that he carry out his responsibilities to the parties by fashioning an appropriate remedy. As arbitrator Irvings stated his view of the problem facing him:

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[2] The grievance has never been heard on the merits. The Petitioner has refused to proceed to the second stage of the bifurcated hearing process, while it has insisted on litigating the present procedural issue to the highest judicial levels. The grievant, Joyce Lucia, continues to teach at the College as a part time faculty member, despite the fact that there have been several full time openings in her department.

> Unlike some contracts, the parties' agreement does not state that if the initial filing deadline is missed the grievance is deemed waived. Under such contracts, an arbitrator is without authority to go beyond a rigid application of the deadline and determine an appropriate remedy for a contract breach. Where the consequences of a missed deadline have not been specified, however, an arbitrator is in the same position as when considering any other deviation from contractual requirements, be it by the College, the Union, or an employee. An arbitrator has the power to fashion a remedy which is compensatory, not punitive. An arbitrator must look at and respond to the harm suffered by the College and the motivation of, and advantage gained by, the Union or an employee.
> Opinion and Award, (p. A-31).

It is the arbitrator's reasoning, as set forth above, which was critical to the decision of the Court of Appeals. This Court stated in Misco, that: "as long as the arbitrator is even arguably construing or applying the contract," his award should be upheld by the reviewing court. 108 S.Ct. at 371. The arbitrator clearly recognized that explicit contractual language mandating forfeiture or waiver would limit his jurisdictional authority and leave him with no alternative but to rule that the grievance was non-arbitrable due to the Union's untimely filing. See

Detroit Coil Co. v. Machinists Lodge 82, supra. He also recognized, however, that in the absence of such language, it was his responsibility to rule on questions of procedural arbitrability, including questions concerning timeliness and waiver, in accord with accepted maxims of arbitral decision making, as well as general principles of contractual interpretation. See Wiley v. Livingston, supra; Stroehmann Bros., supra; Washington Hospital Center v. Local 722, supra; Operating Engineers Local 406 v. Austin Co., 184 F.2d 1262 (5th Cir. 1986). His decision in the present case represents neither a novel nor an irrational approach to a frequently encountered problem of contractual interpretation and enforcement.[3] It is inherent in the role of the arbitrator that he must be granted wide latitude in interpreting the contract, and, especially, in formulating remedies. As this Court has stated the principle:

> When an arbitrator is commissioned to interpret and apply the collective bargaining

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[3] See Restatement (Second) of Contracts, Section 204 (Supplying an Omitted Essential Term), and Section 229 (Excuse of a Condition to Avoid Forfeiture) (1984).

> agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.
> Steelworkers v. Enterprise Wheel & Car Corp., supra, at 597.

The Petitioner argues that in submitting the grievance to arbitration it had not agreed to authorize the arbitrator to fashion an appropriate remedy. Such a contention represents the purest form of sophistry. A right without a remedy is clearly no right at all, and the arbitrator in the present case was not operating in a vacuum when he heard this case and rendered his award. Numerous arbitrators have relied on the absence of explicit contractual default provisions in reaching the merits of a dispute despite lapses in timeliness. In doing so, they have held that contractual time guidelines:

> [A]re not to be treated as strict statutes of limitation, unless so provided, but rather as indicative of the need for prompt action, and of the parties intention to agree that stale claims shall not be pressed.

Kellogg Co., 71 LA 494, 496 (Hon, 1978), quoting Patterson-Sargent Co., 23 LA 21, 23 (Willcox, 1954).

In arriving at similar conclusions, different arbitrators have relied on a variety of rationales, including: simple maxims of equity ("equity abhors a forfeiture"), Township of Neville v. PA, 75 LA 668 (Freeman, 1980); Bogalusa Community Medical Center, 84 LA 978 (Nicholas, 1985); basic principles of contract law, Kellogg Co., supra, at 496; and various extenuating or mitigating factors, such as intervening holidays and disruptions in the normal work schedule, Kent County, MI, 75 LA 948 (Kruger, 1980). Still other arbitrators have found that the absence of a contractual waiver clause in and of itself required them to exercise their inherent authority to decide the proper impact of missed deadlines. See International Paper Co., 82 LA 306 (Williams, 1984); Edward C. Levy Co., 81 LA 529 (Borland, 1983); G & H Transportation, 75 LA 644 (Bullen, 1980).

In attempting to rebut this argument the Petitioner has relied heavily on the reasoning of the district court, and the claim that the arbitrator had exceeded his authority and violated the express language of the contract in making his award. That reliance is misplaced and unconvincing. The district

court's opinion and rationale, like the reasoning of the Petitioner, actually border on the oxymoronic. The court first finds that the award "unquestionably modifies the express and precise language of Article XI," but in the next sentence admits that although "the Agreement does not explicitly spell out that failure to file on time is deemed to be a waiver," such a waiver "is, at least implicit in the requirement...." (p. A-21). Of course, where the agreement does not explicitly "spell out" a specific penalty, and where the issue is whether waiver is "implicit" in the terms of the agreement, then by definition there is no "express and precise" language which could be modified by the arbitrator. In such a situation, it is clearly up to the arbitrator to draw the proper inferences and determine what is "implicit" in the language of the agreement, and it is incumbent upon the reviewing courts to affirm the arbitrator's determination if it is even "arguably" correct. See Misco, supra. It is clear that the district court chose to substitute its judgment for that of the arbitrator in determining what inferences should be drawn from the "actual" language of the agreement. The Court of Appeals acted in accord with applicable precedent when it recognized this error by the court below.

reversed the district court judgment, and affirmed the original arbitration award.

In conclusion, the challenged arbitration award clearly "draws its essence" from the contractual provisions bargained for by the parties, including both what is contained and what is not contained, in the collective bargaining agreement. That reasonable arbitrators, and reasonable judges, have agreed with the reasoning of the challenged award is amply demonstrated by the decisions cited above. The arbitrator in the present case was simply performing his accepted function in interpreting the collective bargaining agreement and determining the intent of the parties. The arbitrator's finding that the underlying grievance was arbitrable on the merits represents a reasonable exercise of his authority under the parties' collective bargaining agreement, and the Court of Appeals correctly affirmed the arbitrator's ruling pursuant to this Court's decision in Misco, supra.

C. THE PETITIONER'S ARGUMENTS MISSTATE THE DECISION OF THE COURT OF APPEALS AND ARE BASED ON A MISREADING AND MISINTERPRETATION OF THIS COURT'S DECISION IN MISCO.

In arguing for the granting of a writ of certiorari, the Petitioner has totally miscast the decision of the Court of Appeals, and misinterpreted Misco in a manner that threatens the continued viability of the arbitral process in the collective bargaining arena. The Petitioner alleges that the Court of Appeals committed reversible error by "taking the Supreme Court at its word," (Petition, p. 9), while it equates the court's citation to applicable precedent with "cast(ing) the blame." (Petition, p. 9). This represents a novel form of legal reasoning, considering the basic nature of common law jurisprudence in the United States over the last two hundred years, and certainly this argument must be rejected.

Moreover, nothing in the Court of Appeals' decision supports the Petitioner's claim that in reaching its decision the court below was "casting blame," acting "against its better judgment," or felt

"compelled by this Court to act in defiance of the logical reading of clear contractual language," as alleged by the Petitioner (Petition, p. 9). In their opinion, the majority of the Court of Appeals stated the perfectly correct view that, under Misco, "any 'exception' to the normal rule (that forbids the court to find an arbitrator's interpretation outside the authority delegated to him by the contract) is extremely narrow." (p. A-3) They affirmed the arbitrator's award, and reversed the decision of the district court, because the arbitrator's decision was clearly "arguably" correct. They supported their decision by framing a "plausible argument" that favored the arbitrator's interpretation of the collective bargaining agreement (p. A-3). And they concluded their opinion by stating that: "(W)hether we would find these arguments convincing were it up to us to interpret the contract is beside the point...," since "(w)e can imagine some judges or arbitrators accepting these arguments (without stretching the imagination very far)." (p. A-6), (emphasis added). See Enterprise Wheel and Car Corp., supra.

The Petitioner's claim that the reasoning of the Court of Appeals constitutes the establishment of a new, "plausibility" standard is totally without merit. This argument ignores the fact that "arguably" and

"plausibly" are used virtually synonymously and totally interchangeably in both legal decisions and in normal English conversation. The court below could not have better applied the Misco "arguability" standard than by determining whether or not there was a "plausible argument" that would support the arbitrator's decision. (p. A-3) In fact, such reasoning by a reviewing court must be found to be at the heart of any determination under Misco, and is hardly a vulnerable subject of criticism in the present case. The dissent below, and the Petitioner, both claim to be concerned with the misuse and abuse of language, but the Petitioner's lengthy attempts to distinguish between the "plausible" and the "arguable" must raise far more serious questions as to whether "reason must still rule the use and intent of our juridical language" than does the reasoning of the arbitrator, or the majority opinion of the Court of Appeals. (Compare, Petition, p. 13; Dissent p. A-8). The court below correctly applied this Court's teaching in Misco in reaching its decision to affirm the arbitration award. The Petitioner's arguments are without merit, and the Petition for a Writ of Certiorari should be denied.

VI

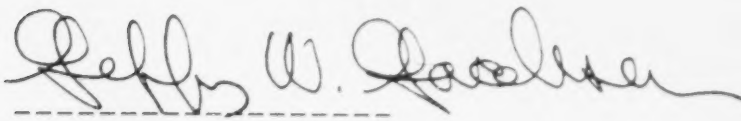
CONCLUSION

The First Circuit Court of Appeals decision affirming the original arbitration award and reversing the judgment of the district court decision is clearly correct and is mandated by this court's decision in Misco, as well as by earlier precedents dating back to the Steelworkers Trilogy. The arbitrator's opinion is well reasoned, and draws its essence from the parties' collective bargaining agreement, and from his interpretation of the provisions of that agreement. Neither the arbitration award, nor the decision of the Court of Appeals, pose any threat to the collective bargaining process, and both are in accord with the overwhelming weight of precedent on the questions at issue. On the facts of this case, there is no basis for granting the petitioned for writ of certiorari, or for reversing the decision of the Court of Appeals.

The Respondent would respectfully suggest that the Court deny the Petition for a Writ of Certiorari. The arbitration award should be allowed to stand as the final and binding decision it was intended to be.

pursuant to the original intent of the parties and the provisions of their collective bargaining agreement.

Respectfully submitted,



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